

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
CC VIII Operating, LLC d/b/a Charter	)	
Communications	)	
	)	CSR 5812-E
Petition for Determination of Effective	)	
Competition in Sauk Centre, MN	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 12, 2002**

**Released: December 16, 2002**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. CC VIII Operating, LLC d/b/a Charter Communications ("Charter") has filed with the Commission a petition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended ("Communications Act"), and Sections 76.7(a)(1) and 76.905(b)(2) of the Commission's rules for a determination of effective competition in Sauk Centre, Minnesota (the "Franchise Area").<sup>1</sup> Charter alleges that its cable system serving the Franchise Area is subject to effective competition and is therefore exempt from cable rate regulation because of the competing services provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and EchoStar Communications Corporation ("EchoStar"). In addition to the DBS providers, Mainstreet Communications ("Mainstreet") is a competing cable provider in the Franchise Area. No opposition to the petition was filed.

**II. DISCUSSION**

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>2</sup> as that term is defined by Section 76.905 of the Commission's rules.<sup>3</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area. Based on the record in this proceeding, Charter has met this burden.

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50

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<sup>1</sup>47 U.S.C. § 543(a)(1); 47 C.F.R. §§ 76.7(a)(1), 76.905(b)(1).

<sup>2</sup>47 C.F.R. § 76.906.

<sup>3</sup>47 C.F.R. § 76.905.

percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.<sup>4</sup>

4. Turning to the first prong of the competing provider test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.<sup>5</sup> Charter has provided evidence of the advertising of DBS service in the local media serving its Sauk Centre franchise area.<sup>6</sup> With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer at least 12 channels of video programming, including at least one non-broadcast channel.<sup>7</sup> We find that Charter has demonstrated that the Franchise Area is served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Charter also demonstrated that two DBS providers are physically able to offer MVPD service to subscribers in the Franchise Area, that there exists no regulatory, technical, or other impediments to households within the Franchise Area taking the services of the DBS providers, and that potential subscribers in the Franchise Area have been made reasonably aware of the MVPD services of DirecTV and EchoStar.<sup>8</sup> Therefore, the first prong of the competing provider test is satisfied.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Charter sought to determine the competing provider penetration in its franchise area by purchasing a report from SkyTrends that identified the number of subscribers attributable to the DBS providers in the Franchise Area on a five-digit zip code basis.<sup>9</sup> However, rather than simply accepting SkyTrends' figures, Charter assumes that some of the DBS subscribers identified in the report may actually live in portions of the zip codes outside its franchise areas.<sup>10</sup> To account for such a possibility, Charter has devised a formula that compares U.S. Census household data for the Franchise Area and the relevant zip codes in order to derive an allocation to apply against the DBS subscriber counts.<sup>11</sup> Charter then reduces the estimated DBS subscriber count for each franchise area by 10 percent to reflect the possibility that some households have subscribed to both cable and DBS service and to take into account commercial or test accounts.<sup>12</sup> The Commission believes that Charter' methodology is sound since it seeks to accurately quantify subscribers using the best available DBS subscriber data.

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<sup>4</sup>47 U.S.C. §543(1)(1)(B); *see also* 47 C.F.R. §76.905(b)(2).

<sup>5</sup>*See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

<sup>6</sup>*See* Charter Petition at 3 and Exhibit 1.

<sup>7</sup>*See* 47 C.F.R. §76.905(g). *See also* Charter Petition at 2 and Exhibit 2.

<sup>8</sup>Charter Petition at 3 - 4 and Exhibit 1.

<sup>9</sup>*Id.* at 5.

<sup>10</sup>*Id.* at 5 – 6 and Exhibit 5.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.* at 6 and Exhibit 5. According to documentation previously provided to the Commission, SkyTrends' zip code subscriber numbers are inflated by roughly ten percent "due to dual receivers, and limited commercial and test accounts." *See Charter Communications*, 17 FCC Rcd. 15,491, 15,493 n.13 (MB 2002)

6. Charter is the largest MVPD in the Franchise Area with 823 subscribers.<sup>13</sup> Mainstreet and the DBS providers have a combined penetration rate of 62.7 percent.<sup>14</sup> Based upon the Mainstreet/DBS subscriber penetration level calculated using Census 2000 household data,<sup>15</sup> we find that Charter has demonstrated that the number of households subscribing to programming services offered by MVPDs other than the largest MVPD, exceeds 15 percent of the households in the Franchise Area. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that its cable system serving the Franchise Area is subject to effective competition.

### III. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by CC VIII Operating, LLC d/b/a Charter Communications **IS GRANTED**.

8. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>16</sup>

FEDERAL COMMUNICATIONS COMMISSION

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<sup>13</sup> *Id.* at 5 and Exhibit 3.

<sup>14</sup> *Id.* at 6 - 7 and Exhibits 5 and 6 (1,013 combined Mainstreet/DBS subscribers ÷ 1,616 Sauk Centre households = 62.7%).

<sup>15</sup> *Id.* at 6 and Exhibit 4.

<sup>16</sup> 47 C.F.R. §0.283.